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No. 90-1715

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In the Supreme Court of the United States

OCTOBER TERM, 1991

PHT, INC., d/b/a POLYNESIAN HOSPITALITY TOURS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supported the determination of the National Labor Relations Board that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act by discharging employees who engaged in a work stoppage to protest working conditions and unfair labor practices.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Abilities & Goodwill, Inc. v. *NLRB*, 612 F.2d 6 (1st Cir. 1979)	9
Detroit Edison Co. v. *NLRB*, 440 U.S. 301 (1979)	10
Dobbs Houses, Inc. v. *NLRB*, 325 F.2d 531 (5th Cir. 1963)	9
Hoytuck Corp., 285 N.L.R.B. 120 (1987)	6, 9
NLRB v. *Oakes Machine Corp.*, 897 F.2d 84 (2d Cir. 1990)	9
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951)	11
Woelke & Romero Framing, Inc. v. *NLRB*, 456 U.S. 645 (1982)	10

Statute and rule:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 7, U.S.C. 29 U.S.C. 157	4
§ 8(a)(1), 29 U.S.C. 158(a)(1)	4, 5
§ 8(a)(3), 29 U.S.C. 158(a)(3)	5
§ 8(b)(1)(B), 29 U.S.C. 158(b)(1)(B)	6
§ 10(e), 29 U.S.C. 160(e)	9, 10
Sup. Ct. R. 14.1(a)	11

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 920 F.2d 71. The decision and order of the National Labor Relations Board (Pet. App. 7a-101a) are reported at 297 N.L.R.B. No. 30.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1990. A petition for rehearing was denied on February 8, 1991. Pet. App. 103a. The petition for a writ of certiorari was filed on May 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner provides bus tours and ground transportation between airports and hotels in the Honolulu, Hawaii area. Pet. App. 2a, 14a-15a. In 1986, after several of petitioner's employees complained about their working conditions, a committee of employees began meeting regularly with representatives of petitioner to discuss those conditions. By the fall of 1986, employee morale had deteriorated to the point where petitioner convened a mandatory meeting with the employees' committee, to be held on September 9, 1986. At the meeting, management and the employees discussed subjects such as starting times, daily hours, and weekend days off. The employees also voiced the complaint that work assignments were made unfairly and based on favoritism. Thereafter, the employees reduced their complaints to writing and requested a written response. Petitioner never responded in writing, however, and its verbal response was deemed unacceptable by the employees. *Id.* at 48a-50a.

On October 10, 1986, the employees again met with petitioner's representatives and reiterated their complaints. Among other things, the employees complained that Operations Manager Gloria Sylva was assigning work unfairly and showing favoritism to particular employees. Although the employees did not demand that Sylva be terminated or transferred, management volunteered that Sylva was already scheduled to be transferred to another department. The next day, despite assurances given to the employees that their statements would be kept confidential, Sylva summoned one of the employees to her office and chastised him about the statements that he

and the other employees had made at the previous day's meeting. Pet. App. 23a, 50a-51a, 56a, 89a.

As the employees' concerns increased, Teamsters Local 996 (Union), which had lost a representation election in 1985, renewed its efforts to organize petitioner's employees. On October 22, 1986, the Union filed a representation petition with the National Labor Relations Board (Board). Pet. App. 13a, 48a, 51a. After learning of the petition, Operations Manager Sylva interrogated several employees about their own and other employees' union activities. *Id.* at 51a-52a, 69a-73a. The friction between management and the employees was exacerbated when petitioner suspended dispatcher William Kahihikolo for soliciting on behalf of the Union. On October 27, the Union filed an unfair labor practice charge protesting Kahihikolo's suspension. *Id.* at 9a, 51a-52a. On November 3, Sylva disciplined driver Larry Fujihana for soliciting on behalf of the Union. *Id.* at 53a-54a, 77a-80a.

b. By early November, the employees became frustrated over their unresolved complaints about working conditions and petitioner's interference with the employees' organizing activity. Accordingly, they decided to hold a work stoppage. Pet. App. 54a-55a. On the morning of November 10, the employees told the Union of their decision not to report for work that day and requested that a Union representative speak to petitioner on the employees' behalf. *Id.* at 55a-56a. In response, a Union representative met with petitioner's labor consultant, informed him of the employees' grievances, and requested that petitioner recognize the Union. *Id.* at 59a-60a.

Also on the morning of November 10, Sylva warned the employees gathered outside petitioner's premises that, if they did not return to work, they would be

disciplined, discharged, or permanently replaced. Later, Sylva told several of them that they were "terminated." Pet. App. 60a-61a, 75a. By noon, a number of employees had begun picketing with signs stating that petitioner was "unfair," and that there was a labor dispute between petitioner and the Union. The picketing continued for several days. *Id.* at 3a, 63a, 65a-66a. During the picketing, the employees shouted a variety of demands to petitioner's management, including the demand that Sylva be replaced, discharged, or removed from a position of supervising the employees. *Id.* at 3a, 63a-64a. On November 17, 1986, petitioner sent letters to most of the employees notifying them that their employment was terminated. *Id.* at 67a.

2. On charges filed by the Union, the Board's General Counsel issued a complaint, and, after a hearing, the administrative law judge (ALJ) found several violations of the National Labor Relations Act (Act). The Board affirmed those findings and found other violations, determining that petitioner had committed unfair labor practices by coercively interrogating employees about their union activities, in violation of Section 8(a)(1) of the Act, 29 U.S.C. 158 (a)(1);[1] discriminatorily enforcing its no-solicitation rule against union activity and disciplining an employee because of his union activity, in violation of

[1] Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act, 29 U.S.C. 157. Under Section 7, "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 8(a)(1) and (3), 29 U.S.C. 158(a)(1) and (3);[2] and improperly threatening employees with discharge and then discharging them for engaging in protected activity when they stopped work, in violation of Section 8(a)(1) and (3). Pet. App. 7a-8a & nn. 1-2, 69a-91a.

The Board agreed with the ALJ's conclusion that the employees' work stoppage enjoyed protection under the Act because the employees were protesting working conditions and unfair labor practices. Pet. App. 8a n.2, 88a-89a. The ALJ rejected petitioner's contention that the employees stopped work in order to seek the discharge of Sylva; instead, the ALJ found that, in engaging in the work stoppage, the "employees were acting in concert to protest working conditions, and also to demonstrate support for the Union." *Id.* at 80a; see also *id.* at 75a (the employees were "withholding services * * * in concert with other employees in order to protest working conditions"); *id.* at 81a ("The employees were acting in concert to protest, and seek redress of, complaints about certain of their wages, hours and working conditions."); *id.* at 86a (the employees' " 'stop work' protest" was based not only on a "perception that an unfair labor practice had been committed" against a person later determined to be a supervisor, but also "to protest certain activities * * * regarded by employees as harassment"). Although acknowledging that "Sylva was a source of much concern among employees," the ALJ pointed out that the employees did not suggest

[2] Section 8(a)(3) makes it an unfair labor practice for an employer to engage in "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3).

her removal; rather, petitioner had initiated the idea that Sylva be transferred to another position several weeks before the work stoppage began. *Id.* at 89a. The ALJ further found that the employees' "rude and vulgar" chants directed at Sylva from the picket line were in direct protest of Sylva's unfair labor practices and came only after her action in discharging them. *Id.* at 89a-90a. Against that background, the ALJ did not find that the objective of the work stoppage was to force her removal.[3]

The Board noted its agreement with the ALJ's finding that the stoppage was protected "for all the reasons stated by him." Pet. App. 8a n.2. The Board added that it had previously found that the Act protects "employees' concerted activities concerned with the selection or termination of a supervisor who has an impact on their working conditions." *Ibid.*, citing *Hoytuck Corp.*, 285 N.L.R.B. 904 (1987). In this case, the Board said, "it is abundantly clear from Sylva's own testimony that her performance of her duties as operations manager directly affected the working conditions of unit employees." Pet. App. 8a-9a n.2.

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[3] Petitioner also claimed that the employees had violated Section 8(b)(1)(B), 29 U.S.C. 158(b)(1)(B), which makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." In rejecting that claim, the ALJ noted that he knew of no authority that an employee, as opposed to a union, could violate that provision, and that, in any event, petitioner adduced no evidence that the employees desired to remove Sylva as petitioner's collective bargaining representative, rather than simply supporting her termination because of her unfair labor practices. Pet. App. 89a-90a.

3. The court of appeals enforced the Board's order. Pet. App. 1a-6a. Petitioner's main contention was that the work stoppage was not protected under Section 7 of the Act because its "real objective" was to have Sylva removed; petitioner claimed that the Act does not protect "employee protests concerning the composition of management personnel." Pet. App. 4a. Petitioner also suggested that the employees had attempted to force Sylva's removal because of her gender, and argued that employee actions to enforce such discrimination are not entitled to protection under the Act. *Ibid.*

The court, however, rejected petitioner's view of the employees' motives, and concluded that "substantial evidence supports the Board's finding that the employees engaged in the stoppage to protest working conditions and perceived unfair labor practices committed by the Company." Pet. App. 5a. Based on that determination, the court held that "the Board correctly concluded that the work stoppage constituted protected concerted activity, and that PHT violated the Act in discharging the employees." *Ibid.* Accordingly, the court found "no reason to reach, and hence express no opinion on, the section 7 status of protests relating to the selection, discharge, or replacement of supervisory personnel." *Ibid.*

ARGUMENT

1. Petitioner contends that review is warranted to address the questions (1) whether a strike aimed at procuring the discharge of a management official is protected by the Act, (2) whether a strike is protected if the employee's objection to the official is based on her gender, and (3) whether an employer commits an unfair labor practice by disciplining employees for a strike that is motivated by protected as well as unprotected reasons. Pet. i, 7. These issues, however, are not properly presented by the record in this case. This Court's review is therefore not warranted.

All three of petitioner's issues are premised upon a factual finding that the Board did not make: that the work stoppage by petitioner's employees was motivated in whole or in part by a desire to force the discharge of a management official, and that the employees pursued the official's removal because of her gender. The Board, however, did not find that the strike was motivated, even in part, for the purpose of procuring the discharge of a management official, or that the employees' protests were related to gender. To the contrary, the Board found that the work stoppage was intended to protest the employees' working conditions and petitioner's unfair labor practices—purposes that plainly constitute a protected basis for a strike. Correctly concluding that these findings were supported by substantial evidence (see pp. 11-12, *infra*), the court of appeals rejected petitioner's claim that 'the real objective of the employees' work stoppage" was to force the removal of a management official, and it therefore "s[aw] no reason to reach, and hence express[ed] no opinion on, the section 7

status of protests relating to the selection, discharge, or replacement of supervisory personnel." [4] Pet. App. 5a.

The third contention advanced by petitioner—that a strike exposes employees to discipline if any objective of the strike is unprotected—is barred for an additional reason. This issue was not raised before the Board. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extrordinary circumstances."

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[4] Although the issue is not properly raised in this case, we note that petitioner errs in claiming (Pet. 10) that the courts of appeals have entirely rejected the Board's position on employee protests over the discharge or retention of a supervisor. The Board considers such protests to be protected activity where the supervisor "has an impact on employee working conditions," but not where "employee concerted activity is designed solely to effect or influence changes in the management hierarchy." *Hoytuck Corp.*, 285 N.L.R.B. 904 n.3 (1987). Courts have agreed that employee protests over a supervisor because of the impact on working conditions can be protected, see, *e.g.*, *NLRB* v. *Oakes Machine Corp.*, 897 F.2d 84, 89 (2d Cir. 1990), but the courts have generally required consideration of the reasonableness of the means of concerted activity as well as the nature of the employees' objections in determining whether protests over management personnel are protected. See, *e.g.*, *Abilities & Goodwill, Inc.* v. *NLRB*, 612 F.2d 6, 8-10 (1st Cir. 1979); *Dobbs Houses, Inc.* v. *NLRB*, 325 F.2d 531, 537-538 (5th Cir. 1963). This case, of course, does not implicate that issue because the court of appeals accepted the Board's conclusion that the work stoppage was not designed to secure Sylva's discharge. Moreover, none of the cases cited by petitioner (Pet. 8-9 nn.2-10) involves a situation where, as here, employees were protesting unfair labor practices committed by a supervisor.

Although petitioner may now take the position (Pet. 5) that the work stoppage had both protected and unprotected objectives, before the Board petitioner argued that the sole objective of the work stoppage was Sylva's discharge; it made no claim that if the stoppage also had protected motives, the allegedly impermissible motive would still render the action unprotected.[5] Nor does petitioner make any effort to demonstrate the existence of "extraordinary circumstances" to excuse its failure to raise that mixed-motive issue before the Board, even on a petition for reconsideration or rehearing. Accordingly, there is no basis for petitioner to litigate that claim here. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982) (finding the court of appeals to be "without jurisdiction" to consider an issue not raised before the Board (on rehearing or otherwise), vacating the portion of the court of appeals' judgment addressing the issue, and remanding with instructions to dismiss); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311 & n.10 (1979) (finding employer's "basic challenge" to be "foreclosed * * * by § 10(e) of the Act because of the Company's failure to raise it before the Board").[6]

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[5] See Pet. Amended Exceptions to Decision of the ALJ at 6, 7, 8 (Dec. 28, 1988); Pet. Br. in Support of Amended Exceptions at 4, 5, 23, 30-31, 36-37 (Dec. 28, 1988).

[6] Contrary to petitioner's contention (Pet. 22), the court of appeals did not find that because the strike was motivated in part by protected motives it was not necessary for the court to determine whether unprotected motives also existed. Rather, the court flatly rejected petitioner's assertion that the objective of the work stoppage was to cause "Sylva's removal." Pet. App. 4a-5a. In any event, even if the court of appeals had reached petitioner's claim, that would not relieve petitioner of the bar imposed by Section 10(e). See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. at 665-666.

2. The only issue properly presented on this record is whether the court of appeals correctly concluded that substantial evidence supported the Board's findings. Assuming that factbound issue to be "fairly included" within the questions presented, Sup. Ct. R. 14.1(a), it does not warrant further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). The court of appeals correctly held that the Board's findings are amply supported by the record.

The ALJ found that in the months preceding the work stoppage, petitioner's employees had complained to petitioner about various working conditions, including starting times, daily hours, weekend days off, and favoritism shown by Operations Manager Sylva in assigning work. Petitioner responded to these complaints in part by telling the employees that Sylva was slated to be transferred. When the employees' discontent with their working conditions grew and they resumed their efforts to unionize, petioner suspended a dispatcher, disciplined an employee engaged in solicitation, and—through Operations Manager Sylva—coercively interrogated several employees about union activity. When the employees discussed those events with Union representatives, they were told that the Union had already filed an unfair labor practice charge and was thinking of establishing a recognitional picket line. Frustrated by the pace of events, petitioner's recalcitrance, and Sylva's obstruction of their efforts to organize, the employees decided to withhold their services in protest.

Contrary to petitioner's assertion (Pet. 19 & n.23) that the Board misapplied the law to the "undisputed facts" that petitioner's employees sought to force Sylva's removal and that they did so because of her

gender, the Board did not find that the employees' objective was to oust Sylva or that their objections to her were based on gender.[7] It is true that much of the employees' anger was directed at Sylva, and that some of the picketing employees urged that she be transferred or terminated. But the ALJ, affirmed by the Board, found that the employees' reason for making those statements was their perception that Sylva engaged in favoritism and had committed unfair labor practices. Pet. App. 89a-90a. Petitioner itself had initiated the concept of transferring Sylva; the statements made by employees endorsing her transfer (or termination) came some weeks later, after the work stoppage had begun and Sylva had told them they were discharged. *Id.* at 89a. Accordingly, the Board properly found that the employees' comments made on the picket line did not establish that the purpose for the stoppage was to remove Sylva from management.

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[7] In upholding the ALJ's findings, the Board noted that it has previously "found to be protected employees' concerted activities concerned with the selection or termination of a supervisor who has an impact on their working conditions," and that Sylva's duties directly affected working conditions in this case, Pet. App. 8a n.2, but the Board did not question the ALJ's factual finding that the employees were not seeking Sylva's removal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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